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Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, Leandro Despouy, submitted in accordance with Commission resolution 2005/33 of 19 April 2005.

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Summary

This report identifies the issues that have been of greatest concern to the Special Rapporteur since the sixty-first session of the Commission on Human Rights and describes the main activities that he has carried out. Because this is the first report that this Special Rapporteur has submitted to the General Assembly, the introductory section outlines the basis of his mandate and substantive developments in that regard, which, in turn, reflect the progress made in the field of human rights.

The first substantive issue addressed in the report concerns the delicate situation currently facing the judiciary in Ecuador as a result of the unconstitutional dismissal of the members of the Constitutional Court and the Supreme Electoral Court, followed by the dismissal of the members of the Supreme Court in late 2004. The political and social crisis triggered by these events created a climate of institutional instability of such magnitude that it ultimately led to the ousting of the President of the Republic, Lucio Gutiérrez. The Special Rapporteur conducted two missions to the country: the first in April 2005, during which he called on the authorities to restore the rule of law and appoint an independent Supreme Court, and the second in July 2005 after the new President of the Republic, Alfredo Palacio, had taken office and the National Congress had adopted the reform of the Law on the Organization of the Judiciary, establishing an ad hoc mechanism for selecting the members of the Supreme Court through a Qualifications Committee. To lend greater transparency and credibility to the process of selecting judges, the Special Rapporteur recommended, in accordance with Ecuadorian legislation, that international — and, in particular, United Nations — observers should be asked to oversee the process. In addition, he called on the Qualifications Committee to bring its rules of procedure into line with the Constitution and the international treaties signed by Ecuador. At the time of writing (August 2005), the Committee had just started operating. The Special Rapporteur is therefore planning to conduct another visit a few days before his oral presentation of this report to the General Assembly.

Many States are currently discussing the adoption of national measures that could undermine adherence to international human rights standards. One example is the current debate in the United Kingdom concerning domestic measures applicable to suspected terrorists. Another negative development is the resumption of proceedings before the military commissions established by the United States of America, as they do not comply with international standards concerning the right to a fair trial because they are very closely linked to the executive branch, do not allow appeals to be brought before a civil judge, deny the right to defence and discriminate between nationals and non-nationals. As regards the transfer of Guantánamo Bay detainees to their countries of origin, the Special Rapporteur urges the States concerned to respect the rights which have thus far been denied them.

As regards terrorism, the Special Rapporteur reiterates his condemnation of terrorist practices and expresses his profound sorrow and solidarity with the victims of the bloody attacks carried out in London and Sharm el-Sheikh in July 2005. He also reiterates his conviction that concerted action by the international community is needed in order to effectively combat this scourge. In the report, he notes that there have been a number of setbacks concerning respect for the rule of law and human rights as a consequence of the counter-terrorism measures adopted since the previous

session of the Commission on Human Rights. In particular, he expresses his concern at the dangerous tendency to roll back existing levels of international protection.

As regards the International Criminal Court, the Special Rapporteur welcomes the recent accessions to the Rome Statute and the Agreement on the Privileges and Immunities of the International Criminal Court. However, he is concerned about the continued opposition of some Governments to the Court, particularly when it takes the form of bilateral immunity agreements with States parties. The report highlights the Security Council's important decision to refer to the Court the grave human rights violations occurring in the Darfur region of the Sudan, which has signed the Rome Statute but is not yet a Party thereto, and calls for this valuable precedent to be applied to other situations of comparable seriousness and magnitude.

As regards the Iraqi Special Tribunal, the Special Rapporteur expresses his concern at the manner in which the trials already under way are being conducted. While acknowledging the commitment and personal efforts of the judges on the Tribunal and the cooperation provided by some countries when it was being set up, the Special Rapporteur has identified a number of shortcomings, some of which can be traced back to the manner and circumstances of the Tribunal's establishment. Of particular concern is the fact that the Tribunal's jurisdiction is restricted to specific people and a specific time frame; i.e., it can only try Iraqis for acts committed before 1 May 2003. In the Special Rapporteur's view, the Tribunal's power to impose capital punishment demonstrates the extent to which it contravenes international human rights standards.

At a time when the international community is discussing crucial reforms aimed at improving the effectiveness of the United Nations, such as the creation of a standing Human Rights Council, the report stresses the importance of ensuring that these reforms reflect the valuable experience acquired by the special procedures of the Commission on Human Rights. It also expresses the hope that the restructuring process currently under way will acknowledge the growing importance and cross-cutting nature of the issues addressed by this Special Rapporteur and that the measures necessary to the success of his work will be duly implemented.

The common denominator of the report's conclusions and recommendations is that they look to the United Nations to provide much of the answer to the main challenges currently existing in this area, given the inextricable and increasingly evident links between respect for human rights, peace and international security.

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I. Introduction

1. This report is the first to be submitted to the General Assembly by the Special Rapporteur on the independence of judges and lawyers, in accordance with Commission on Human Rights resolution 2005/33 of 19 April 2005. In essence, it describes the Special Rapporteur's activities in 2005, one of the most important of which was his mission to Ecuador to follow up on the recommendations made during an earlier visit to the country. The report also addresses three very topical issues: the right to a fair trial in the context of the fight against terrorism, the activities of the International Criminal Court and the establishment of the Iraqi Special Tribunal. It also briefly raises other issues that the Special Rapporteur intends to address in his next report, such as, the right to the truth, access to justice and the challenges that transitional situations pose for the judiciary, particularly in societies emerging from conflict.

2. The issues addressed here, while important and complex, represent only part of the Special Rapporteur's mandate. As indicated in the report submitted to the Commission on Human Rights at its sixty-first session, in subsequent reports the Special Rapporteur intends to tackle issues relating to the separation of powers, problems regarding access to justice, gender equity, the role of justice in combating corruption in general and in the judicial system in particular, and the independence and external auditing of that system.

II. Terms of reference and methods of work

3. By its resolution 1994/41 of 4 March 1994, the Commission on Human Rights established the Special Rapporteur's terms of reference, which originally focused on the defence of judges, lawyers, prosecutors and court officials who had been victims of persecution or undue interference. This mandate was conceived as part of the Commission's work on the protection of all persons subjected to any form of detention or imprisonment. Over time, these terms of reference were extended to include the analysis of all the factors that could have an impact on the structure and functioning of the judicial system, impairing its independence, and of factors that hinder or prevent access to justice. More recently, the terms of reference were extended by various Commission resolutions to include other issues, such as the right to the truth in the context of combating impunity (resolution 2005/66) and transitional justice (resolution 2005/70).

4. The method of work used to draft this report follows the traditional model of the reports drawn up every year by the special rapporteurs. It includes an analysis of the situation of the judiciary in a number of specific countries, on the basis of allegations made and issues raised, as well as country visits; communications and urgent appeals to Governments; consultations with Governments, the relevant mechanisms and procedures of the United Nations and other intergovernmental organizations, non-governmental organizations (NGOs) and national institutions and organizations; participation in national, regional and international meetings and events; and the promotion of legislative initiatives and advocacy.

III. Activities of the Special Rapporteur in 2005

A. Activities to date

5. At the sixty-first session of the Commission on Human Rights, the Special Rapporteur submitted his report for 2004 (E/CN.4/2005/60) and a report on various country situations which were brought to his attention during the same period (E/CN.4/2005/60/Add.1). Since 1 January 2005, he has been asked to examine worrying situations in various countries; has sent, either alone or in conjunction with other special rapporteurs, 48 urgent appeals to the Governments of 27 countries and five letters of allegation to the Governments of five countries; and has issued 11 press releases concerning the situations in 12 countries. In addition, the Special Rapporteur submitted to the Commission reports on three missions: to Kazakhstan (E/CN.4/2005/60/Add.2), Brazil (E/CN.4/2005/60/Add.3) and Ecuador (E/CN.4/2005/60/Add.4). While the visits to Kazakhstan and Brazil took place in 2004, the mission to Ecuador, in response to a special invitation from the Government of that country, took place in 2005, on two occasions: the first from 13 to 17 March and the second from 11 to 15 July (see section III below).

6. From 20 to 24 June 2005, the Special Rapporteur participated in the twelfth annual meeting of mandate holders of the special procedures of the Commission, held in Geneva. As mentioned in the report of the meeting (E/CN.4/2006/4), in addition to discussing the adoption of measures to enhance the effectiveness of the special procedures system in terms of the functioning of each mandate and of the system as a whole, the participants decided to establish a five-member coordination committee. The role of this committee will be to support the experts and facilitate coordination between them throughout the year and to promote the standing of the special procedures system within the broader framework of the United Nations and its human rights programmes.

7. During this meeting, the Special Rapporteur, together with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, held a press conference and issued a press statement on the situation of persons detained on grounds of terrorism at the Guantánamo Bay military base and other detention centres. This issue, which was addressed in the 2004 report, is also dealt with in section V below.

8. During this visit to Geneva, the Special Rapporteur also held consultations with officials of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in order to prepare for his follow-up mission to Ecuador, which would be conducted from 11 to 15 July, and his missions to Tajikistan and Kyrgyzstan, which will be conducted from 19 to 30 September at the invitation of the respective Governments. He also met with the representatives of various permanent missions accredited in Geneva, NGOs and United Nations bodies and programmes, as well as with representatives of the Bureau of the sixty-first session of the Commission on Human Rights and with the participants in the seventeenth meeting of chairpersons of the human rights treaty bodies.

9. On 19 May, the Special Rapporteur had a meeting in Geneva with the United Nations High Commissioner for Human Rights and the President of the

International Association of Judges in order to move forward in designing a cooperation project. On 20 May, the Special Rapporteur participated as a speaker and special guest in an event entitled "Justice, Strength of Democracy", held in Rome as part of the celebrations to mark the twentieth anniversary of European Magistrates for Democracy and Freedom (MEDEL). From 28 February to 2 March, the Special Rapporteur participated in an expert seminar convened by OHCHR in Geneva on democracy and the rule of law. On 3 March, he gave a presentation on issues relating to access to justice at a seminar on extreme poverty and human rights, held in São Paulo, Brazil, by the Nippon Foundation. In order to launch a practice of disseminating information about the Special Rapporteur's activities, on 30 June a presentation was given for academics and other law professionals at the Ministry of Foreign Affairs of Argentina; the participants included the President of the International Association of Judges, judges of the Supreme Court of Argentina, the deans of faculties of law and the presidents of the main associations of lawyers and judges in Argentina. Lastly, on 2 July, the Special Rapporteur gave a presentation on the protection of human rights and the role of justice during states of emergency at the Regional Seminar on Parliamentary Oversight of the Security Sector in Latin America, which was held in Montevideo by the Inter-Parliamentary Union and attended by political and academic figures from Latin America.

B. Future activities

10. In addition to the aforementioned missions to Tajikistan and Kyrgyzstan, the Special Rapporteur plans to participate in the fifth International Human Rights Colloquium, to be held in São Paulo, Brazil, from 8 to 15 October. The theme of the Colloquium, to which he was invited by Conectas Human Rights and Sur — Human Rights University Network, will be "South-South dialogue to strengthen human rights". In this context, on 10 October the Special Rapporteur will give a presentation on the activities relating to his terms of reference and an overview of the main attacks on the independence of judges and lawyers in the southern hemisphere. In addition, on 17 and 18 October, he plans to participate in a seminar on the right to the truth, organized by OHCHR in Geneva. Lastly, just before he submits this report to the General Assembly, the Special Rapporteur will conduct another follow-up mission to Ecuador in order to collect up-to-date information.

IV. Mission to Ecuador

A. Background

11. After his mission of 13 to 18 March 2005, concerning which a report (E/CN.4/2005/60/Add.4) was submitted to the Commission on Human Rights at its sixty-first session, the Special Rapporteur conducted a second mission to Ecuador from 11 to 15 July, at the invitation of the Government. The purpose of the visit was to follow up on his recommendations and, in particular, to help find the most appropriate means of resolving the crisis caused by the unconstitutional dismissal, on 25 November 2004, of the members of the Constitutional Court and the Supreme Electoral Court, followed by the dismissal of the members of the Supreme Court on 8 December.

12. During his stay, the Special Rapporteur met with the President of the Republic and other senior government officials; the President of the National Congress and deputies of various political affiliations; judges of the Supreme Electoral Court and members of the National Council of the Judiciary; former members of the Constitutional Court; the mayors of the cities of Quito and Guayaquil; the members of the Qualifications Committee responsible for restructuring the Supreme Court; representatives of associations of judges and judicial officials of NGOs; directors, journalists and opinion editors of various media outlets; and prominent Ecuadorian legal experts. He also held discussions with many diplomatic representatives accredited to Ecuador and with representatives of international bodies. The Special Rapporteur is grateful to the Government of Ecuador and to all the officials and representatives of civil society who cooperated extensively with him.

13. On 7 April 2005, prior to his visit, the Special Rapporteur held initial consultations at United Nations Headquarters with the Under-Secretary-General for Political Affairs and editorial and publishing staff, the United Nations Development Programme (UNDP) Regional Director for Latin America and the Caribbean and the UNDP Resident Representative in Ecuador, in order to exchange information on developments in the country and on future activities. On 16 and 17 June, the Special Rapporteur returned to New York to analyse, together with the same officials and an OHCHR representative, the feasibility and appropriateness of conducting a second mission to Ecuador and the possible participation of the United Nations as an observer in the Supreme Court selection and restructuring process. The Special Rapporteur is grateful to the local UNDP office for its assistance, and would like to highlight the excellent degree of cooperation between himself and the United Nations departments and programmes that made a significant contribution to his work in Ecuador, as well as the support lent by OHCHR.

B. Context

14. In his preliminary report, the Special Rapporteur warned that the situation in Ecuador could worsen if the normal working of the country's institutions was not restored. He also made urgent recommendations aimed at achieving an immediate return to the rule of law, suggesting possible avenues and criteria for establishing an independent Supreme Court.

15. Unfortunately, the recommendations were accepted only partially by the main institutional stakeholders in Ecuador. First, the National Congress and the Government failed to reach agreement on a mechanism to overturn the series of unconstitutional decisions adopted in late 2004. In this context, the new Supreme Court — labelled "de facto" by broad sectors of the population — adopted a decision of enormous political significance, by declaring that the proceedings against two former Presidents of the Republic, Abdalá Bucaram y Gustavo Noboa, and one former Vice-President, Alberto Dahik, were null and void. This decision aggravated the social and political tensions in the country, and the crisis spread to the main institutions. In response to growing popular demonstrations and protests, President Lucio Gutiérrez, through an executive decree of 15 April 2005, dismissed the Supreme Court which had been appointed illegally on 8 December 2004 and declared a state of emergency in the city of Quito. Both decisions were rejected by the majority of the country's citizens, with the result that the institutional crisis deepened even further. On 17 April, in line with the recommendations contained in

the Special Rapporteur's preliminary report, the National Congress reversed the resolution of 8 December 2004 by which it had illegally appointed the members of the Supreme Court. However, it did not order the reinstatement of the members of the Court who had been removed in late 2004. Ecuador was therefore left without a Supreme Court, and the decision by Congress was not sufficient to placate the citizenry. On 20 April, in an attempt to curb the wave of tension and violence, which was becoming particularly intense in the capital, the National Congress declared that President Lucio Gutiérrez had left office and that, in accordance with the constitution's provisions on presidential succession, Vice-President Alfredo Palacio would assume the presidency. On 26 April, the National Congress adopted a draft reform of the Law on the Organization of the Judiciary, in line with another of the Special Rapporteur's recommendations, in order to pave the way for the restructuring of the Supreme Court.

C. Mechanism for appointing members of the Supreme Court

16. In order to administer the process of evaluating and appointing the new judges and associate judges of the Supreme Court, the new Law on the Organization of the Judiciary provides for the establishment of a Qualifications Committee. The purpose of this ad hoc mechanism is to compensate for the fact that the constitutional clause on the principle of co-optation cannot be applied because the body authorized to do so, namely the Supreme Court, is non-existent.

17. The Qualifications Committee, which began its work in mid-June, is composed of four members: one appointed by the country's law faculties, one appointed by the country's superior courts and ordinary courts, one appointed by legally constituted human rights organizations and one appointed by civil-society organizations.

18. In line with the mandate established in the Law on the Organization of the Judiciary, the Committee adopted rules of procedure spelling out the application, evaluation, interview and appointment process whereby candidates are selected as Supreme Court judges and associate judges. These rules, along with a call for applications, were published on 11 July 2005 in the two newspapers with the largest national readership, thereby initiating the process.

19. During his visit, the Special Rapporteur observed that, probably as a result of the difficult social and political circumstances in which they were adopted, both the Law on the Organization of the Judiciary and the Committee's rules of procedure contain a number of provisions whose application would contravene a number of constitutional principles and international standards that protect the professional practice of lawyers. In particular, the Special Rapporteur highlighted several of the ineligibility criteria established for the post of judge, such as those contained in paragraphs 10 and 11 of the second article of the Law on the Organization of the Judiciary, which are reproduced in article 3 of the Committee's rules. These ineligibility criteria, which relate to the defence of certain cases, undermine the free exercise of the legal profession, the right to defence and principles such as non-discrimination and non-identification of lawyers with their clients. During the round of interviews, this perception was confirmed by the views of several renowned national legal experts.

20. During their meeting with the Special Rapporteur, the Committee members indicated their willingness to address and rectify deficiencies in the Law on the

Organization of the Judiciary and in the rules of procedure that might breach Ecuador's fundamental laws or international human rights treaties. In accordance with articles 18, 163, 272 and 273 of the Political Constitution of Ecuador, the provisions of the Constitution and of international treaty law take precedence over any domestic laws or rules which are incompatible with those provisions. The Special Rapporteur noted that he would take the Constitution and the international human rights treaties ratified by Ecuador as the legal frame of reference for his observations. Since there was no competent body to rule on the unconstitutionality of some of the legal and regulatory provisions to be applied in the selection of judges, it was important that the Committee should insert an interpretation clause explicitly recognizing the supremacy of the Constitution and of international treaties.[1] In the same context, the Special Rapporteur emphasized the need to respect the principles of gender equity and equal opportunity for men and women, especially in view of article 102 of the Constitution, which expressly refers to the participation of women in the administration of justice. Before the end of the visit, the Chairman of the Committee, Mr. Carlos Estarellas, informed the Special Rapporteur that the Committee had decided that both the Law on the Organization of the Judiciary and the Committee's rules of procedure would be applied in accordance with the Constitution and the international treaties ratified by Ecuador.

21. The Special Rapporteur believes that the aforementioned principles must be respected if the selection process is to provide sufficient guarantees of transparency and equity to encourage broad participation by the legal community. In his view, there are a number of respected, prominent jurists in Ecuador who would make excellent Supreme Court judges.

D. Observation of the evaluation and appointment process

22. Although the process of evaluating and selecting future members of the Court is the exclusive responsibility of Ecuadorians, the Law on the Organization of the Judiciary invites the United Nations, the European Union and the Andean Community to observe the process. In view of that provision and in accordance with the wishes of the majority of the stakeholders consulted, the Special Rapporteur asked the United Nations to undertake that activity on an ongoing basis until the process is completed. He also called for the participation of internationally recognized organizations whose activities are directly related to judicial matters, such as the International Association of Judges. The Special Rapporteur welcomes the decision of the Spanish Agency for International Cooperation to join a team of observers coordinated by the United Nations. The Special Rapporteur has also been informed that the Organization of American States will be present during the observation process and that the Andean Community has appointed an observer. The Special Rapporteur believes that the coordinated efforts of international and national observers will result in a more transparent and rigorous evaluation and appointment process. The terms of reference for the United Nations observers have been submitted to the Government and to the Qualifications Committee and have been presented to the public.

[1] This situation came about because all the members of the Constitutional Court were dismissed and it is legally impossible to set up a new Court until the Supreme Court, which is responsible for submitting a shortlist of candidates, is appointed.

23. The objective of the United Nations observers is to support the conduct of a transparent selection process that is free of undue influences and complies with national and international standards and principles regarding the independence of judges and lawyers. In accordance with the terms of reference, at all stages of the process the observers must remain impartial, refrain from interfering in matters for which national authorities have exclusive responsibility and focus on providing support of an eminently technical nature. They should not become or be viewed as key players in the process.

24. The responsibilities of the United Nations international observers shall be:

(a) To observe the evaluation and selection of Supreme Court judges and associate judges in order to confirm that the process is impartial, transparent and credible;

(b) To ensure that the Law on the Organization of the Judiciary and the Committee's rules of procedure are applied throughout the entire process in accordance with the Constitution and international treaties;

(c) To identify any non-compliance with national and international standards on the independence of judges and lawyers and to inform the Committee thereof;

(d) To identify any external interference in the evaluation and selection process and to inform the Committee thereof;

(e) To coordinate its activities with those of other national and international observers;

(f) To report to the United Nations on the conduct of each stage of the process, so that the Organization may communicate the findings to the Committee and to the Ecuadorian authorities.

25. In performing their duties, the United Nations international observers may:

(a) Hold regular meetings with the Qualifications Committee, national and international observers, participating auditing firms and such other actors as they may deem appropriate in order to exchange relevant information;

(b) Provide information and make suggestions at the request of the Qualifications Committee and authorized observers;

(c) Gather information on the evaluation and selection process from the Committee and from public and private entities.

26. The observers will continue their activities throughout the entire evaluation and selection process, including the swearing-in of the judges.

E. Situation of the Constitutional Court and the Supreme Electoral Court

27. With respect to the Constitutional Court, the Special Rapporteur observes that the National Congress has adopted a decision similar to the one taken regarding the Supreme Court, which was illegally dismissed in late 2004: it reversed the decision of 25 November 2004 whereby it had appointed a new Constitutional Court, but did not order the reinstatement of the members who had been removed under that decision. The Special Rapporteur is concerned to note that, in the absence of a

Supreme Court, which is responsible for proposing a shortlist of candidates, it is impossible to appoint the members of the Constitutional Court. As a result, the country is bereft of its highest authority for ruling on matters relating to human rights and constitutional guarantees, raising constitutional challenges and issuing legal opinions in relation to the adoption of international agreements. Given the importance of the Constitutional Court, the Special Rapporteur hopes that the country will rectify the lack of this institution in a manner that adheres strictly to the parameters and requirements established in the Constitution and the Law on the Organization of the Judiciary, in a context of complete transparency.

28. The Special Rapporteur observes that the Supreme Electoral Court is the only high court to which new members have been appointed since the crisis in April of this year. After interviewing members of the Court, he confirmed that, as stated in the preliminary report on his first visit, the Court is seen more as a political body than as a court dispensing justice in electoral matters. This may be due to the wording of the Constitution or to the way the parties interpret it. The Court members themselves said that they shared this perception and that an institutional reform was needed in order to separate the specifically political activities related to elections from the jurisdictional activities which the Court carries out in its capacity as an essentially technical and legal authority. The Special Rapporteur is of the opinion that such a reform would constitute an important institutional advance.

29. As mentioned earlier, the Special Rapporteur intends to visit Ecuador again so that he may provide the General Assembly with current information regarding the follow-up of his recommendations.

V. Counter-terrorism and the right to a fair trial

30. The Special Rapporteur examined this topic in his report to the Commission on Human Rights at its sixty-first session, focusing in particular on the human rights situation of persons accused of terrorism and detained by the United States of America at Guantánamo Bay and by coalition forces in Iraq and Afghanistan. In paragraphs 34 and 35 of that report, he questioned the legal validity of the sui generis category of "enemy combatant", concluding that the current international legal order does not provide for any possibility of excluding any person from the application of the standards of international human rights law and international humanitarian law, regardless of the legal classification used: "enemy combatant", insurgent, terrorist, etc.

31. The world situation has deteriorated considerably since that report was presented to the Commission. The bloody attacks in London and Sharm el-Sheikh clearly demonstrate that terrorists continue to commit acts which should be unanimously condemned and whose eradication requires concerted action by the international community. At the same time, many States are debating the adoption of national measures that could undermine adherence to international human rights standards. The United Kingdom, for example, is currently debating the adoption of domestic measures against suspected terrorists. In another disturbing development, Guantánamo Bay detainees are once again being tried by military commissions, which do not meet international standards concerning to right to a fair trial, in that they do not allow appeals to be brought before a civil judge, deny the right to defence, and discriminate between nationals and non-nationals, among other

problems. As regards the transfer of Guantánamo Bay detainees to their countries of origin, the Special Rapporteur urges the States concerned to respect the rights which have thus far been denied them.

32. It should be recalled that the Commission on Human Rights has been actively engaged in this field for several years. At their tenth annual meeting, held in June 2003, the special rapporteurs, representatives, independent experts and chairpersons of working groups of the special procedures of the Commission expressed profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affected negatively the enjoyment of virtually all human rights. The participants expressed their determination, in the framework of their respective mandates, to monitor and investigate developments in that area (see E/CN.4/2004/4).

33. At their eleventh annual meeting, held in June 2004, the special procedures mandate holders reiterated their determination to continue monitoring the situation and unanimously proposed that the Chairperson-Rapporteur of the Working Group on Arbitrary Detention and the Special Rapporteurs on the independence of judges and lawyers, the right to health and the question of torture, jointly visit persons who had been arrested, detained or tried on grounds of terrorism or other violations, in Iraq, Afghanistan, the Guantánamo Bay military base and elsewhere (see E/CN.4/2005/5, annex I). The purpose of the visits was to enable the mandate holders to ascertain whether international human rights standards were properly upheld with regard to those persons and to make themselves available to the authorities concerned for consultations and advice on all issues within their areas of competence. In January 2002, the experts began submitting individual and joint requests to the Government of the United States to visit the Guantánamo Bay military base. These requests were later extended to include Iraq, Afghanistan and other detention centres where persons accused of terrorism were being held. On 4 April 2005, the experts met with officials of the Permanent Mission of the United States in Geneva to discuss the terms of such a visit. However, the Government of the United States indicated that the circumstances were not favourable at that time. At the twelfth annual meeting of special procedures mandate holders, the Special Rapporteur on the independence of judges and lawyers, the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the right to health and the Special Rapporteur on the questions of torture, with the support of the other participants, expressed their concern regarding the United States' refusal to provide an answer to the requests and announced their decision to conduct an investigation of the matter, regardless of whether or not they were allowed to visit the detention centres.

34. The Special Rapporteur welcomes the decision taken by the Commission on Human Rights at its sixty-first session to appoint, in accordance with resolution 2005/80, a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Rapporteur's mandate includes gathering information on alleged violations of human rights and fundamental freedoms while countering terrorism, with special attention to areas not covered by other mandate holders; making recommendations and providing advisory services or technical assistance, at the request of States; identifying and promoting best practices on measures to counter terrorism that respect human rights and fundamental freedoms; establishing areas of cooperation with Governments, relevant United Nations specialized agencies and programmes, non-governmental

organizations and regional and subregional institutions; working in close coordination with other special procedures mandate holders of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights and other relevant United Nations bodies; and reporting regularly to the Commission and to the General Assembly. The Special Rapporteur welcomes the recent appointment of Mr. Martin Scheinin to this new mandate and trusts that it will result in a more effective and comprehensive approach to the issue of counter-terrorism and that close cooperation will be established between the holder of the new mandate and the other special rapporteurs who deal with this issue within their respective areas of competence, so as to avoid gaps or overlaps.

VI. The International Criminal Court

35. In a very auspicious development, two additional States have acceded to the Rome Statute of the International Criminal Court since the Special Rapporteur's last report to the Commission: Kenya and the Dominican Republic on 15 March and 12 May 2005, respectively. It is also significant that the Agreement on the Privileges and Immunities of the International Criminal Court was ratified by the Governments of Croatia, Latvia, Lithuania and Sweden between December 2004 and January 2005. However, the Special Rapporteur is concerned about the continued opposition of some Governments to the Court's effective functioning, particularly when it takes the form of bilateral immunity agreements with States parties.

36. The existence of the International Criminal Court and the fact that the Security Council, acting under Chapter VII of the Charter of the United Nations, may refer to the Court serious human rights violations in States not parties to the Rome Statute constitute significant advances towards ending impunity.

37. The Special Rapporteur would particularly like to recognize the important precedent set in Security Council resolution 1593 (2005) of 31 March 2005, whereby the Security Council referred the situation in the Darfur region of the Sudan to the International Criminal Court, thereby exercising, for the first time, the right to refer war crimes and massive human rights violations to the Court, as provided in article 13 (b) of the Rome Statute of the International Criminal Court, which concerns the referral of situations in which any of the crimes referred to in the Statute appears to have been committed. By its resolution 1593 (2005), which was adopted with 11 votes in favour and 4 abstentions, the Security Council decided to refer reports of grave human rights violations and war crimes committed in Darfur since 1 July 2002 to the International Criminal Court, thereby complementing its resolution 1590 (2005) of 24 March 2005, whereby it established the United Nations Mission in Sudan, and its resolution 1591 (2005) of 29 March 2005, whereby it tightened the arms embargo against the Sudan and imposed other sanctions. This not only constitutes a decisive step towards ensuring that the crimes committed in Darfur — the extent of which demonstrates once again the inextricable link between peace, security and the administration of justice — do not go unpunished; it also sends an important message in relation to other situations of comparable gravity and magnitude.

38. The above-mentioned resolution is the result of positive interaction among different United Nations bodies and procedures and is based on the report of the International Commission of Inquiry on violations of international humanitarian law

and human rights law in Darfur, which the Secretary-General was requested to establish by Security Council resolution 1564 (2004) of 18 September 2004.

39. It may be recalled that the members of the International Commission of Inquiry were appointed in October 2004 by the Secretary-General and asked to report on their findings within three months. The Commission's mandate focused on four objectives: to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; to determine whether or not acts of genocide had occurred; to identify the perpetrators of such violations; and to suggest means of ensuring that those responsible were held accountable. The report of the International Commission of Inquiry on Darfur (S/2005/60) contains an extensive list of grave violations of international humanitarian law that constitute war crimes, as well as violations of international human rights law. These include the most reprehensible attacks against civilians, such as murder, torture, forced displacement of persons, various forms of sexual violence, enforced disappearance, detention, looting and destruction of villages and property. Given the systematic and widespread pattern of these attacks, they amount to crimes against humanity.

40. To ensure accountability for the crimes committed in Darfur and taking into account the deficiencies of the Sudanese judicial system, the International Commission of Inquiry for Darfur recommended that the Security Council should refer the situation to the International Criminal Court. Encouragingly, as a result of the adoption of Security Council resolution 1593 (2005), on 1 June the Prosecutor of the International Criminal Court decided to open an investigation into the situation in Darfur.

41. This case is significant not only because it is topical and innovative, but also because it highlights the fact that the deficiencies of national legal systems can be overcome if the international community decides to take action for the purpose of dispensing justice.

VII. The Iraqi Special Tribunal

42. At the time of writing (August 2005), the Special Rapporteur is concerned about the judicial proceedings taking place before the Iraqi Special Tribunal. Despite the commitment and personal efforts of the judges and the cooperation provided by several countries in setting up the Tribunal, he is concerned that the pressure weighing on the judges and the prevailing insecurity in Iraq may undermine its independence. Moreover, the Tribunal itself has certain deficiencies, some of which can be traced back to the manner in which it was set up and, in particular, to the restriction of its jurisdiction to specific people and a specific time frame; i.e., the Tribunal may only try Iraqi citizens for acts committed prior to 1 May 2003, when the occupation began. The Tribunal's power to impose the death penalty demonstrates the extent to which it contravenes international human rights standards. Because it was established during an occupation and was financed primarily by the United States, its legitimacy has been widely questioned, with the result that its credibility has been tarnished.

43. The Special Rapporteur urges the Iraqi authorities to follow the example set by other countries with deficient judicial systems by asking the United Nations to set up an independent tribunal which complies with international human rights standards.

VIII. Transitional justice and the right to the truth

44. In his next report to the Commission on Human Rights, the Special Rapporteur will analyse the challenges faced by judicial authorities in administering justice in transitional situations and in applying the law in societies emerging from conflict. In that connection, he will elaborate on the context of the international standards that should guide the actions of the judicial system, so as to ensure due process in situations characterized by fragile institutions and political and social instability.

45. In accordance with Commission on Human Rights resolution 2005/66, the Special Rapporteur intends to analyse in depth the link between the right of access to justice and the right to the truth. Recent decisions such as the one taken by the Supreme Court of Argentina on 14 June 2005 declaring the unconstitutionality of the "full stop" and "due obedience" laws, which had severely restricted the prosecution of crimes, have reaffirmed that victims of serious human rights violations and their relatives are entitled to expect that their national legal systems will prosecute such violations, identify the perpetrators and clarify the circumstances. The Special Rapporteur believes that there is an indissoluble link between the right to the truth and the fight against impunity, and intends to examine the question further, to complement the study which the United Nations High Commissioner for Human Rights will conduct, in accordance with Commission on Human Rights resolution 2005/66.

46. To that end, the Special Rapporteur will participate in a seminar on the right to the truth organized by OHCHR in Geneva.

IX. Conclusions and recommendations

47. **The Special Rapporteur's mandate and methods of work were outlined at the beginning of this report because it is the first which he is submitting to the General Assembly. The aim was to provide an overall picture of the Special Rapporteur's objectives and duties and of the different sources and mechanisms used in his work.**

48. **With respect to the situation of the judiciary in Ecuador, the Special Rapporteur's visits revealed the chronic weakness of the country's institutions and the serious obstacles to rectifying it. The Special Rapporteur also found that actions that undermine justice have repercussions that spread beyond the judicial branch and extend to the institutional framework as a whole, potentially leading to political consequences, such as those observed in Ecuador in April 2005, which culminated in the removal of the President of the Republic, Lucio Gutiérrez. The work currently being carried out by the Qualifications Committee to select the members of the future Supreme Court represents the first step towards reorganizing of justice system; this task also calls for immediate and substantial reforms. The unprecedented participation of the United Nations in observing the Committee's activities is a true innovation in the Organization's work in this field. It also demonstrates that the highest authorities in Ecuador share a genuine desire for transparency.**

49. **Despite the clear international consensus that counter-terrorism must be conducted in accordance with the rule of law, the Special Rapporteur observes that, in practice, both the rule of law and international law have been**

repeatedly violated to the detriment of many human rights, particularly the right to personal integrity and the right to a fair trial by a legally established, independent and impartial tribunal. In many States, counter-terrorism measures have undermined other rights, such as freedom of opinion, expression, assembly and association and the right to strike, and have negatively affected specific groups, such as migrant workers, refugees and asylum-seekers. What is more, the measures currently being debated in some European countries can only aggravate this trend. Coming from a region whose population was victimized by the illegal actions taken by States to suppress violence, the Special Rapporteur reiterates his conviction that nothing can combat irrational acts and extreme forms of violence more effectively than the wisdom embodied in the rule of law. The appointment of a Special Rapporteur specifically mandated to monitor compliance with international human rights law in counter-terrorism actions is an important step forward in this regard. The Special Rapporteur is prepared to cooperate fully with this new mandate holder, and proposes that the latter take into account the work carried out in this area by the different mandate holders of the special procedures within their respective areas of competence. In this context, attention should be drawn to the reports on terrorism and human rights submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Ms. Kalliopi Koufa, the publication of which as a single document has been recommended by the Commission.

50. With regard to the International Criminal Court, the Special Rapporteur welcomes in particular the important precedent set by the decision of the Security Council, acting under Chapter VII of the Charter of the United Nations, to exercise for the first time its power under article 13 (b) of the Rome Statute to refer to the Court the serious human rights violations which have taken place in the Sudan, a signatory but not a party to the Rome Statute. This constitutes decisive progress towards ending impunity and also a valuable lesson, as it shows that action by the international community can adequately compensate for deficiencies in national legal systems. By extending the Court's jurisdiction to States not parties to the Rome Statute, the Security Council has demonstrated the value it attaches to justice in its primary role of maintaining international peace and security.

51. The Special Rapporteur points out that the Iraqi Special Tribunal has certain deficiencies and that its legitimacy has been rightfully criticized, with the result that its credibility has been called into question. He is alarmed that it is empowered to impose the death penalty, that its jurisdiction is restricted to specific persons and a specific time frame, and that it otherwise violates international human rights standards. He hopes that the Iraqi authorities will adopt relevant measures to ensure that the barbaric crimes committed in Iraq will be prosecuted by independent and impartial tribunals, in strict compliance with international human rights standards, as other countries in similar circumstances, such as Sierra Leone, have done with the active cooperation of the international community. As mentioned earlier, mankind has admirably demonstrated that it is possible to overcome legal or material constraints at the national level, combat impunity and dispense justice, on the basis of different international precedents.

52. **At a time when the United Nations is implementing crucial innovations, such as the establishment of a standing Human Rights Council, the Special Rapporteur believes that the new Council should take into account the experience acquired by the special procedures of the Commission on Human Rights and should make those procedures a fundamental part of its future efforts to improve the protection and promotion of human rights. At the same time, he would like to emphasize the central role which justice has come to play in United Nations activities over the past few years, as an instrument for the protection of human rights and a tool for enabling the Security Council to carry out its primary function of maintaining international peace and security, in accordance with Chapter VII of the Charter. In that spirit, the Special Rapporteur hopes that the restructuring of the United Nations will acknowledge the fundamental and cross-cutting nature of the issues addressed by this Special Rapporteur and establish the necessary mechanisms to strengthen his work.**